PERMALU VYRAPAN

v.

G. PAPATHI GOVINDASAMY

HIGH COURT MALAYA, PENANG
MOHAMED DZAIDDIN J
[CIVIL SUIT NO. 22-260-1985]
26 MAY 1992

CONTRACT: *Whether any privity of contract existed between the plaintiff and person alleged to be an agent - Whether specific performance lies against the agent.*

CIVIL PROCEDURE: *Summons in chambers - Joinder of parties - Cause of action based on specific performance of an oral agreement for sale of property - Party intended to be joined was alleged to be the agent of defendant - Party intended to be joined had earlier applied to be struck out as co-defendant - Succeeded - Whether plaintiff entitled to rejoin - Rules of the High Court O. 15 r. 6(2)(b)(ii) - Joinder of parties - Whether party can be joined after expiry of limitation.*

On 12 March 1985 the plaintiff instituted this action against the defendant and her husband, G. Letchimanan, who was named as the 1st defendant claiming for specific performance of an oral agreement allegedly made between him and the defendant in the month of September 1981 for the sale of a property. It was pleaded in the statement of claim that the defendant was the vendor and owner of the said property.

On 4 April 1985, Letchimanan applied to the Court under O. 15 r. 6(2)(a) to strike out his name as the 1st defendant. On 22 September 1986, this Court granted the application with a further order that the plaintiff redeliver the amended statement of claim. The plaintiff accordingly refiled the amended writ of summons and the statement of claim and it was pleaded under para. 3 that the defendant through her husband and agent agreed to sell the said property.

By a summons in chambers the plaintiff applied to reinstate Letchimanan as a defendant and for leave to add fresh paragraph in the amended statement of claim which were said to be consequential.

There was no supporting affidavit filed in support of the plaintiff's application. However the plaintiff submitted that he wanted to add Letchimanan as the 2nd defendant since the amended statement of claim alleged that the latter was an agent of the defendant.

Held:

[1] Order 15 r. 6(2) gives the Court wide powers and a wide discretion so as to determine the issues or questions in dispute between the parties. But like all discretions, the Court must exercise it properly and at a proper time.

[2] From the original statement of claim, it was clear that Letchimanan was never a party to the alleged oral agreement and therefore no privity of contract between him and the plaintiff existed. Hence there was no cause of action founded on contract against Letchimanan.

[3] Both the amended statement of claim and the proposed reamended statement of claim were still founded on the original cause of action that is specific performance of the oral agreement allegedly made between the plaintiff and the defendant. Though the amendment

alleged that the defendant through Letchimanan agreed to sell the said property, there was still no privity of contract between the plaintiff and Letchimanan to found a case of specific performance. Hence he would still be unnecessarily made a party under r. 6(2)(a).

[4] Even if the claim was sustainable by joining him (Letchimanan) as a party, the plaintiff will be caught by limitation of action. Leave to add a defendant will not be granted after the expiry of any relevant period of limitation affecting the proposed defendant.

[5] Since the claim against Letchimanan will be time barred when he was joined as a defendant, he was entitled to an order under r. 6(2)(a) because he will either be a person "who has been improperly made a party" or, as soon as it is known that he will plead the limitation defence, he will "cease to be a party" within r. 6(2)(a).

[Application dismissed with costs.]

Cases referred to:
Selvamary v. Rethinasamy [1991] 1 CLJ (Rep) 412 ***(foll)***
Lucy v. W.T. Henleys Telegraph Works Co. Ltd. [1970] 1 QB 393; [1969] 3 All ER 456 ***(foll)***
Liff v. Peasley [1980] 1 All ER 623 ***(foll)***

Legislation referred to:
Limitation Act 1953, s. 6(1)(a)
Rules of the High Court 1980, O. 15 r. 6(2)(a), (b)(ii)

For the applicant/plaintiff - Darshan Singh Khaira; M/s. Darshan Singh & Co.
For the respondent/defendant - Thillaimuthu; M/s. Thillaimuthu & Phock Kin

JUDGMENT

Mohamed Dzaiddin J:

By this summons in chambers the plaintiff applied for an order under Rules of the High Court 1980 O. 15 r. 6(2)(b)(ii) for one G. Letchimanan be added as 2nd defendant and consequently to reamend the amended writ of summons and the statement of claim as per draft amendment attached to this application.

Rule 6(2) states as follows:

> At any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just and either of its own motion or on application -
>
> (a) order any person who has been improperly or unnecessarily made a party or who has for any reason ceased to be a proper or necessary party, to cease to be a party;
>
> (b) order any of the following persons to be added as a party, namely -
>
> (i) any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matters be effectually and completely determined and adjudicated upon, or
>
> (ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the Court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter.

There was no supporting affidavit filed in support of the plaintiff's application. Mr. Darshan submitted that the plaintiff wanted to add the husband of the defendant as the 2nd defendant since the amended statement of claim alleged that he was an agent of the defendant. As for

the proposed reamended statement of claim, Counsel stated that it was consequential and would not prejudice the defendant who would be compensated by costs. Mr. Thillaimuthu, Counsel for the defendant, objected to this application. He contended that it was misconceived, an abuse of the process of the Court and to cause further delay of the proceedings.

This application raises an interesting point on the rules of practice.

The history of this suit is this. On 12 March 1985 the plaintiff instituted this action against the defendant and her husband G. Letchimanan, who was named as the 1st defendant claiming for specific performance of an oral agreement allegedly made between him and the defendant in the month of September 1981 for the sale of property known as Lot 446, Mukim 13, Air Itam, Daerah Timur Laut, Pulau Pinang, with premises No. 45-H, Lorong 4, Mukim 13, Air Itam, Pulau Pinang (the said property), at a purchase price of RM162,400 and for an order that the said property be transferred to the plaintiff or his nominee and for damages and costs. It was pleaded in the statement of claim that the defendant is the vendor and owner of the said property. On 4 April 1985, Letchimanan applied to this Court under r. 6(2)(a) to strike out his name as the 1st defendant on the ground that he was improperly or unnecessarily made a party to the action and for an order that the plaintiff's statement of claim be amended to exclude him as the 1st defendant therefrom. On 22 September 1986, this Court granted the application with a further order that the plaintiff redelivered the amended statement of claim within 14 days. So, on 27 July 1987 the plaintiff accordingly refiled the amended writ of summons and the statement of claim. Under para. 3 (which is the material paragraph), it was pleaded that the defendant through her husband and agent agreed to sell the said property.

Now, by this summons in chambers the plaintiff applied to reinstate Lechimanan as a defendant and for leave to add fresh paragraphs in the amended statement of claim which were said to be consequential.

Order 15 r. 6(2) gives the Court wide powers and a wide discretion so as to determine the issues or questions in dispute between the parties. But like all discretions, the Court must exercise it properly and at a proper time (per Hashim Yeop A. Sani CJ in *Selvamary v. Rethinasamy* [1991] 1 CLJ (Rep) 412). In this case, Letchimanan was originally a defendant to this action and upon the application of the wife, the defendant, this Court struck him out as the 1st defendant on the ground that he was unnecessarily made a party to this action. On the basis of the original statement of claim, it was clear to me that he was never a party to the alleged oral agreement between the plaintiff and the defendant at or about the month of September 1981. (See para. 3). This is also borne out by the plaintiff's averment that the defendant is the vendor and owner of the said property. There was therefore no privity of contract between the plaintiff and Letchimanan. Hence there was no cause of action founded on contract against the latter. For this reason I struck him out as a defendant. The question is: can the plaintiff now apply to reinstate him as a party under the broad provisions of r. 6(2)(b)(ii) based on the same cause of action i.e. specific performance of an agreement, refund of money allegedly paid and damages? The answer must be 'no'. Both the amended statement of claim filed on 27 July 1987 and the proposed reamended statement of claim are still founded on the original cause of action i.e. specific performance of the oral agreement allegedly made between the plaintiff and the defendant, although the amendment alleged that the defendant through her husband and agent agreed to sell the said property. There is still no privity of contract between the plaintiff and Letchimanan to found a case of specific performance. Hence, he would still be unnecessarily made a party under r. 6(2)(a).

Next, assuming that I am wrong with respect to the above finding, can the plaintiff now join him as a party to the present action in order to claim for the refund of RM100,000 which the plaintiff alleged he paid to Letchimanan under the said oral agreement between him and the defendant. Even if the claim is sustainable, by joining him as a party now, the plaintiff in my opinion, will be caught by limitation of action. It is settled law that limitation of action founded on contract is six years from the date on which the cause of action accrues. See s. 6(1)(a) Limitation Act 1953. In the present case, the cause of action accrued from September 1981 the time when the alleged contract was made and this application to add Letchimanan as a defendant was filed on 11 February 1992 which is more than 6 years. Quite clearly, the plaintiff's claim against him will be time-barred. Leave to add a defendant will not be granted after the expiry of any relevant period of limitation affecting the proposed defendant (*Lucy v. V.T. Henleys Telegraph Works Co. Ltd.* [1970] 1 QB 393/[1969] 3 All ER 456). The joinder of a person as a defendant when the claim against him is time-barred is contrary to the rule of practice because "the true basis of the rule of practice was not the 'relation back' theory but that the action against a person joined as defendant was deemed to have commenced against him from the date on which the writ was amended, so that if the action was then time-barred there was no useful purpose in allowing the joinder" (*Liff v. Peasley* [1980] 1 All ER 623 CA). Further, since the claim against Letchimanan will be time-barred when he is joined as a defendant, he is entitled to an order under r. 6(2)(a) because he will either be a person "who has been improperly made a party" or, as soon as it is known that he will plead the limitation defence, he will "cease to be a party" within r. 6(2)(a) (*ibid*).

Therefore, for the above reasons, I am not inclined to exercise my discretionary power under O. 15 r. 6(2)(b) by allowing the joinder and for consequential amendments because it will not serve any useful purpose particularly when the action against Letchimanan will be time-barred.

Application is dismissed with costs. The parties should now go to trial on the present pleadings.

Also found at [1992] 4 CLJ 2024